Supreme Court of Pitcairn Islands

Queen v 7 Named Accused [2004] PNSC 1; SC 04-04-19 (19 April 2004)

IN THE PITCAIRN ISLANDS
SUPREME COURT

Trials No 1-55/2003

BETWEEN

THE QUEEN

AND

7 NAMED ACCUSED

Hearing: 17, 18, 19, 20, 21 November 2003

6 February 2004

Appearances: Keiran Raftery *and* Fletcher Pilditch *for the Crown*

Paul Dacre *and* Allan Roberts (Public Defender) *and*
Adrian Cook (Q.C. Australian Bar) *for the Accused*

Coram: Blackie C.J.

Lovell-Smith, J.
Johnson, J.

Judgment: 19 April 2004

JUDGMENT OF FULL COURT

Solicitors:
Simon J Eisdell Moore, Director of Public Prosecution, Meredith Connell, DX CP 24003, AUCKLAND for Crown

Paul Dacre, Public Defender, P O Box 47-693, PONSONBY, for Accused

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I. INTRODUCTION

[1] Situated at latitude 25º04' South and longitude 130º06' West, lies Pitcairn Island. This geographic location places it in the Pacific Ocean, midway between New Zealand and Chile, on the west coast of South America. There are three associated islands, making up the Pitcairn Group; namely, Henderson, Oeno and Ducie. The islands are widely scattered over several hundred square miles of ocean. Only Pitcairn has any permanent population. The closest inhabited neighbour is Mangareva Island in the Gambia Archipelago, some 300 miles to the north-west - the eastern most extremity of French Polynesia.

[2] Access to Pitcairn and its associated islands can be gained only by sea. Being of volcanic origin, the Island has a steep, rocky shoreline and is not amenable to port or harbour facilities. Visiting ships, including those bringing supplies, must anchor off the Island and proceed ship-to-shore by way of the Island's long-boats. There are no facilities for any type of aircraft. In size, Pitcairn is approximately 2½ miles long and 1 mile wide, covering 1100 acres. Fertile soil and a favourable climate mean that a wide range of fruit and vegetables can be grown.

[3] The early history of the Island, since its discovery during the course of the voyage of H M S *Swallow* in 1767 and subsequently being named after mid-shipman Pitcairn, is comparatively well-known. Historical events relating to Captain Bligh, Fletcher Christian, HMAV *Bounty*, the mutineers and their settlement on Pitcairn Island have been the subject of numerous books, commentaries and feature films for almost 200 years.

[4] Issues relating to Pitcairn Island and its inhabitants have come before this Court because a number of male Islanders, some resident on the Island and some no longer, have been charged with offences pursuant to the Sexual Offences Act 1956 (UK). Acting on behalf of seven Islanders against whom charges have so far been brought and who have been committed for trial, the Public Defender has made various pre-trial applications, the most fundamental of which is to challenge the jurisdiction of the United Kingdom over the Pitcairn Islands. In fact, the Public Defender has applied for an order declaring all British Orders in Council relating to the Pitcairn Islands since 1859 and all laws passed pursuant to those Orders in Council, to be illegal and therefore void *ab initio*. This Court has heard submissions over a period of six days – in November 2003 and February 2004, and has continued to receive written materials until 8th April 2004.

[5] What makes this pre-trial hearing so distinctive is not only the constitutional importance of the issues the Court has been asked to determine, but the context in which the potential parties live. Pitcairn hosts a tightly-knit community of inhabitants who, due to population size and the Island's remoteness, rely heavily on each other in all of the ways that matter.

[6] In support of his application, the Public Defender sought to demonstrate that the traditional view that Pitcairn was a British settlement capable of becoming a British territory by formal executive steps, based on the British Settlements Act 1887, is erroneous. If that were accepted, it was argued, the claim of the British-appointed Governor in respect of the application of certain ordinances and British Imperial laws to the residents of Pitcairn would founder, and so would plans to prosecute certain of them. The Public Defender advanced this argument by examining the following issues:

1. The relationship of the *Bounty* mutineers to the British Crown at all relevant times from the mutiny, the burning of the *Bounty* on 23 January 1790 and up to

their deaths.

2. The relationship of the children and grandchildren of the *Bounty* mutineers and their Tahitian partners with the British Crown from their birth and thereafter.

3. The proper definition and identification in law of the relationship of the Pitcairn community with the British Government on and after the original arrival of the *Bounty* mutineers in Pitcairn in January 1790 and thereafter, and the return of the Pitcairners to Pitcairn Island in 1859, 1864 and thereafter.

4. Whether, in all the circumstances, existing at the time, the making of the Pacific Order in Council 1893 was applicable to Pitcairn Island then or thereafter as a lawful exercise of powers under Royal prerogative or as granted to the Monarch in Council by any Imperial Statutes.

5. Whether the instructions of the Secretary of State in 1898 and 1903 were valid and lawful so as to bring Pitcairn Island within the jurisdiction of the High Commissioner for the Western Pacific.

6. Whether the Pitcairn Orders of 1952 and 1970 were valid and lawful exercises of power by Her Majesty Queen Elizabeth II in respect of Pitcairn Island.

7. Whether the exercise of delegated powers by the Governor of Pitcairn Islands by virtue of the Pitcairn Order 1970, resulting in the committal for trial of persons to this Court was effective at law, and thus empowered this Court with jurisdiction to deal with the alleged offences.

[7] We will deal with each of these issues, though not necessarily in the order presented by the Public Defender.

[8] For the Crown, the Public Prosecutor contends:

1. That there is an unbroken chain of constitutional authority for all laws and Ordinances of Pitcairn, and all relevant Orders in Council.

2. That as a matter of domestic constitutional law, British jurisdiction over Pitcairn is clearly-established.

3. That as a matter of international law, British sovereignty over Pitcairn is equally clearly-established.

[9] In this judgment, we refer to Pitcairn Island in the singular, as opposed to the group of islands, for the reason that this Court is concerned with the law only as it relates to Pitcairn Island itself.

II. AGREED HISTORICAL EVENTS

[10] The Public Defender has provided the Court with a lengthy chronology, drawn from a mass of historical material. The Public Prosecutor has challenged the significance of much of the material

advanced, and the chronology, as straying into matters of submission and interpretation. Further, a number of relevant historical events are omitted from the chronology. Counsel have only been able to agree upon the validity of some of the dates and events.

[11] The Public Prosecutor submitted that it would be unwise to draw inferences on matters of sovereignty from the numerous historical references and accounts. There are historical variations on the Pitcairn themes. History is, by its very nature, a contentious study. A thorough examination of the history of Pitcairn Island would require extensive expert evidence, lengthy enquiry and could take months of hearing time. Such an exercise is more properly the province of academics, historians, writers and enthusiasts.

[12] The following limited list of historical events was agreed upon by counsel:

> 1767 The sighting by *Swallow*, which was the first purported sighting of the Island by a European. The Island was named Pitcairn's Island, but no attempt was made to land.
>
> 1789 Mutiny occurred aboard the *Bounty*. Fletcher Christian seized the ship, and set Captain Bligh and 18 men adrift in a boat.
>
> 1790 Arrival at Pitcairn. The mutineers arrived with 12 Tahitian women, a baby girl, and 6 men on 23 January 1790. The *Bounty* was set alight in Bounty Bay.
>
> 1791 Captain Bligh returned to London, and HMS *Pandora* was given the task of detaining and retrieving the mutineers.
>
> 1808 The *Topaz*, an American ship, visited the Island. John Adams was the only surviving mutineer at that time.
>
> 1814 Her Majesty's ships *Briton* and *Tagus* visited Pitcairn. John Adams was prepared to accompany the Captain of the *Tagus* back to England, but he was allowed to remain.
>
> 1855 The majority voted to move their community to the larger Norfolk Island. The minority agreed later that they, too, would go.
>
> 1856 The Islanders moved to Norfolk Island, departing in May and arriving in June.
>
> 1859 A few families returned to Pitcairn from Norfolk.
>
> 1886 HMS *Pelican* visited Pitcairn Island. John Tay, a lay preacher of the Seventh Day Adventist Church explained the teachings of the Church.

[13] These dates are truly skeletal. In the course of this judgment, references will be made to a number of additional historical events, which we consider significant in determining the applications before us. Through the industry of counsel, and notably the efforts of Mr Cook, we have had produced to us a collection of copied official and file documents sourced from various Government and private archives in the United Kingdom. They range from the original of the Pitcairn Register (a diary of the years kept by community leaders on Pitcairn between 1790 and 1854) courtesy of the National Maritime Museum, Greenwich, handwritten reports of Royal Navy captains, civil servants and colonial officers, law officers of the Crown and Lords Commissioners of the Admiralty, petitions

and correspondence of residents of and visitors to the Island, to legislative and gazetted instruments of the Crown. Whilst it is plainly not the complete documentation pertaining to the whole history of Pitcairn, it is nevertheless a most comprehensive collection.

[14] Whilst we hesitate to elevate any one of these documents to the evidential status which flows from our taking judicial notice thereof, we draw comfort from our belief that their authenticity can hardly be challenged, and some have been repeatedly referred to by authors of books on Pitcairn's history over the years. We note that Lord Jowitt L C was faced with a similar problem in *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL), where original legal manuscripts of antiquity could not be traced, but their authenticity could not be questioned. We find it helpful to take the documentation presented into account as to both substance and context, when considering the arguments made. Indeed, as the Prosecution has observed, the Court has received from the Public Defender two hundred and seventy one pages of written submissions, together with nine volumes of supporting material.

III. THE CHALLENGE TO BRITISH SOVEREIGNTY AND JURISDICTION

[15] Before embarking upon our consideration of the Public Defender's challenges, we contrast the Public Prosecutor's approach to the jurisdictional conundrum. His main focus has been to show constitutional validity by creating for the Court a network of the germane laws from 1887 onwards. Broadly, the Public Prosecutor submitted that the relevant Orders in Council, ordinances and appointments are lawful, and founded on clearly established constitutional authority.

[16] In the Public Prosecutor's submission, it is unnecessary to examine the history or to question the validity of the laws passed prior to 1952. Every law, it was argued, invoked in the present proceedings traces its validity to the Pitcairn Orders of 1952 & 1970, which are legitimate in their own right. As a matter of domestic constitutional law, British jurisdiction over Pitcairn is clearly established. We will consider the Public Prosecutor's submissions in relation to statutes and ordinances later. At this stage we will examine the historical issues raised by the Public Defender.

[17] It was contended that the onus is on the British Government to convince this Court, "beyond all reasonable doubt", that through examining the historical events, this Court has the jurisdiction to try the Pitcairn Islanders committed for trial.

[18] The Public Defender submitted that the issue relating to the proper definition in law of the relationship of the Pitcairn community with the British Government, can be divided into two distinct periods in time: pre 1856; and, post 1859-1864. If there is found to have been British settlement prior to 1856, the evacuation of the Island from 1856-1859 put a halt to that settlement. Thus, all subsequent claims of sovereignty over the Island must be dismissed, as it was "abandoned and relinquished" by the British.

[19] The Public Defender further submitted that it would be illogical, unjust and unlawful for Her Majesty to fail to accept that when some of the Islanders returned to Pitcairn during the period 1859 to 1864, and all of the previous laws and usages were re-established on Pitcairn in 1864, there continued a suitable and effective legislature, providing a civilised indigenous Government.

[20] As to the period prior to 1856, two major events occurred. The first was the landing of the mutineers on the Island, and the second was the visit by Captain Eliott of HMS *Fly* in 1838.

i) The Mutineers, 1790 and Early Settlement to 1838.

[21] The Public Defender challenges the legal status of the mutineers and their children. The principal question here is whether the *Bounty* mutineers were British subjects when they landed on Pitcairn in 1790. The subsidiary question concerns the legal status of the mutineers' children. The importance of these questions will become apparent when ss 2 & 6 of the British Settlements Act 1887 are later considered.

[22] The Public Defender argued that the concept of being a British subject is based on allegiance to a Monarch. This, he claimed, arises in two ways: at the time of birth, due to the circumstances of that birth – whether in Britain or outside of the Sovereign nation; and by way of the process of naturalisation. (*Calvin's Case* 7 Co. Rep. 377; *Shedden v Patrick et al* (1854) House of Lords Cases, 535.)

[23] While the subject may act in a manner detrimental to the actual existence of the allegiance, it cannot be broken while there is a real or valid prospect of the Monarch exercising a right to pardon the subject in respect of any offence "no matter how serious." The Public Defender accepted that even treason can be pardonable, but said that there must be some reasonable prospect of pardon, in order for the compact to remain on foot. (*Calvin's Case*.)

[24] The Public Defender conceded that the mutineers appear to have been British subjects by virtue of the circumstances of their birth. All nine on board the *Bounty* had allegedly committed the crimes of mutiny and piracy and, after their arrival, they committed the treasonable offence of burning a British ship of war. The latter was an offence punishable by death, under the Naval Dockyards Act 12 Geo III c.24. He argued that, because these men were "fugitives from the laws of England", and had sought out Pitcairn to enable them to be out of reach of the British justice system, they had broken their compact with the Sovereign and were no longer British citizens.

[25] A parallel argument was also raised, that the crimes they allegedly committed (in particular, treason), were so serious that a pardon from the Monarch would have been out of the question. The bond of allegiance had been broken by that defiant act of burning the ship. The Public Defender said that no British subjects occupied the Island until Buffett, Evans and Nobbs took up residence in Pitcairn in the 1820's.

[26] On becoming aware of the act of mutiny, King George III sent British ships to locate the mutineers and return them to England, to face justice. The *Pandora* was despatched, and it is said that the ship came close to Pitcairn in 1791. If the mutineers had been found and returned to Britain, it was contended by the Public Defender that the occupation of the Island would not have occurred and that any attempt to settle would have come to an abrupt end. In fact, the whereabouts of the mutineers remained unknown until the American whaler *Topaz* came across the Island in 1808.

[27] When the Royal Navy discovered, in 1814, that John Adams, the sole surviving mutineer, was alive on Pitcairn, no action was taken to have him returned and tried for the crime of treason. John Adams was never officially pardoned. He remained liable to be tried for his crimes until his death, in 1829.

[28] In reply, the Public Prosecutor submitted that the mutineers were British subjects by birth, having been born in the United Kingdom, and remained so until their respective deaths. When they

arrived in 1790, Pitcairn was uninhabited. He referred to *Joyce*, which clearly states that the commission of a crime, even treason, does not preclude the Crown's exercise of sovereignty as the offender remains a British subject. The Public Prosecutor noted that some of the other *Bounty* mutineers, located in Tahiti, and subsequently tried were in fact pardoned.

[29] *Joyce* is a House of Lords decision involving an American alien holding a British passport. He was commonly referred to as "Lord Haw Haw", as he broadcast Nazi propaganda from Germany to Great Britain during World War II. Joyce was convicted of high treason under the Treason Act 1351, and sentenced to death. He appealed. The House of Lords unanimously held that an alien living abroad holding a British passport enjoys the protection of the Crown, providing he has not renounced this protection.

[30] Lord Jowitt LC, at 366, had the following to say about subjects and their allegiance:

> The natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance? *The natural-born subject cannot at common law at any time cast it off. "Nemo potest exuere patriam" is a fundamental maxim of the law from which relief was given only by recent statutes*.[Emphasis added]

[31] The accused on Pitcairn Island are holders of United Kingdom passports. The Prosecution referred to His Lordship's statement at 369 as relevant:

> The terms of a passport are familiar. It is thus described by Lord Alverstone C.J., in *R v Brailsford* (I): "It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries."
>
> [And]
>
> But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed.

[32] The Prosecutor submitted that the present inhabitants of Pitcairn are clearly British subjects, owing to the mutineers remaining subjects of the British Crown.

[33] We are satisfied, as a matter of fact and law, that the mutineers were and remained British subjects until their respective deaths. They could not withdraw their allegiance through acts of treason, as the Court in *Joyce* confirms, at 371:

> There is one other aspect of this part of the case with which I must deal. It is said that there is nothing to prevent an alien from withdrawing from his allegiance when he leaves the realm. I do not dissent from this as a general proposition. It is possible that he may do so even though he has obtained a passport. But that is a hypothetical case. Here there was no suggestion that the appellant had surrendered his passport or taken any other overt step to withdraw from his allegiance, unless indeed reliance is placed on the act of treason itself as a withdrawal. That in my opinion he cannot do.

[34] We turn to the second question. The Public Defender contended that the mutineers' children were not British subjects because their mothers were Tahitian and their fathers were liable for the crime of treason (*inter alia*). There were 24 children born to the mutineers and their Tahitian partners. No children were born of the union of any of the Tahitian men and women on Pitcairn. It is accepted that these 24 children, who survived their fathers, formed the nucleus of all the Pitcairn Island population thereafter.

[35] The Defender contend that, by virtue of s 2 of the statutes of IV Geo. 2 c.21 & XIII Geo. 3. c.21, Pitcairn children lost their status as British subjects (if they ever had it) and, therefore, so did their children, and so on. The reason for their apparent loss of British status is that the children were born out of wedlock and outside the realms of Great Britain. At law, illegitimate children took the nationality of their mothers at birth, which in this case would have been Tahitian. The mutineers and their descendants did not undergo naturalisation procedures, nor did they become subjects by conquest.

[36] The Defender's contention that, when John Adams died in 1829, any link with the British Crown ceased, overlooks that by that date other British subjects – namely Buffett, Evans and Nobbs – had already taken up residence on the Island. They were British subjects and remained so throughout their lives. Accordingly, notwithstanding the birth of illegitimate children, the death of John Adams did not achieve complete severance of the Islanders from the British Crown. This aspect renders it unnecessary for us to declare the nationality status of the illegitimate children. The argument relates to whether there was a break in British settlement on the death of John Adams. The arrival of British subjects Buffett, Evans and Nobbs to form a significant numerical membership of this tiny community ensured there was no such break.

ii) 1838 and The Visit of HMS Fly: a Constitution and a Code of Laws

[37] In 1838, Pitcairn Island was visited by the *Fly*, under the command of Captain Eliott. The visit followed the intervention of the Royal Navy, when a public enquiry was held aboard HMS *Actaeon* in 1837 into abusive exercise of self-proclaimed authority over other Islanders by a recent settler, Joshua Hill, and Hill's removal to Valparaiso by Captain Bruce of HMS *Imogene* in 1838. It is recorded in *The Development of the System of Government and Laws of Pitcairn Island from 1791 to 1971*, by Donald McLoughlin (BA; LLB) at 20, that Captain Eliott was

> ...promptly requested by the Islanders to make provision for the regulation of their affairs and the appointment of a head or chief. This request stemmed not only from a desire to prevent the possibility of another self-appointed dictator usurping control of their community but also from a desire by the Islanders for protection from the depredations of American whaling crews who were visiting the Island in rapidly increasing numbers.

[38] McLoughlin's text is incorporated into the Laws of Pitcairn, Henderson, Ducie and Oeno Islands (Revised edition, 1971), which was prepared under statutory authority by McLoughlin, as the (then) legal adviser to the Governor.

[39] The tradition reflected in popular historical literature has it that Captain Eliott declared Pitcairn to be a possession of Great Britain, and formally raised the Union Jack as an act of State, Pitcairn thus becoming part of the British Empire. Even the oral tradition of Pitcairners, emerging later into the writings of some descendants confirm this to be so. However, Captain Eliott's own report to

the Admiralty is not so confident. In his report to his Admiral in Callao, Peru, dated January 25th, 1839, he said:

> ... but they very earnestly represented to me the immediate necessity for there being some chief or head to their community, amounting now to 99 souls, for their internal regulation and Government, but more especially to meet the difficulties and dangers which they had already experienced and been again threatened with by lawless strangers in Whale Ships, there having been cases of recent occurrence, where half the ruffian crew of a Whale Ship were on shore for a fortnight, during which they offered every insult to the inhabitants and threatened to violate any woman whose protectors they could overcome by force, occasioning the necessary concentration of the men's strength for the personal protection of the females, and thereby great damage to their crops, which demanded their constant attention, taunting them that they had no laws, no country, no authority that they were to respect. American vessels denying they were under the protection of Great Britain, as they had neither colours, or written authority; I found them however with a Merchant Union Jack flying, procured from an English Ship.
>
> Apprehending that my duty required some decisive step in this unlooked for contingency I considered I should best afford protection to these people, and least involve my Government of whose intentions in respect to the Pitcairn Islanders I am ignorant, by conferring the stamp of Authority on their election of a magistrate or Elder to be periodically chosen from amongst themselves, and answerable for his proceedings to Her Majesty's Government for whose information he is to keep a Journal.
>
> I accordingly drew out a few hasty regulations to be observed, under my authority in the election of this Officer marked No.6, which with a formal attestation of his being sworn in before me, and an Union Jack which I supplied them with, will I trust insure them against any renewed insults from Foreigners. By their unanimous voice, they selected for the situation Edward Quintal a most able and superior senior of their number.
>
> I trust, Sir, you will consider my assumption of the power to confer this Authority was warranted by the urgency of circumstances and the difficulty of reference, and that you will be able to approve of the view I have taken of my duty.

[40] After the report reached London, it was annotated as follows:

> Their Lordships are pleased with the very satisfactory manner in which Captain Elliot [sic] has conducted this [word obliterated].

[41] This approval does not appear to have been followed by any formal notification of sovereignty to the world.

[42] Captain Eliott duly drew up a Constitution and a Code of Laws dated 30 November 1838. This document provided for the election of a Magistrate, along with a Council, which he appears to have been given authority to overrule. The Magistrate's duties were to settle differences, keep a register of all complaints and his decisions, take into custody anyone accused of serious crime to be delivered over to justice to be provided by the captain of the next visiting British warship, and submit an account of events to the captain of any British warship.

[43] The residents were, by this Constitution, required to cooperate with the Magistrate "until he is superseded by the authority of Her Majesty the Queen of Great Britain." The Magistrate was required to swear a specified oath of loyalty to the Queen.

[44] It is said by McLoughlin, at 21:

> By that brief document the people of Pitcairn Island, with the ready assistance of Captain Elliot [sic], formally acknowledged their status as a British possession and, as a natural consequence, placed themselves under the protection of the British Crown.

[45] It is convenient to note here that, in 1852 Admiral Moresby, and in 1892 Captain Rookes of HMS *Champion*, produced revised and more extensive constitutions, the latest creating a Parliament of seven with power to legislate, but with similar reservations for serious crime.

[46] Sir Kenneth Roberts-Wray says in the leading text on colonial law, *Commonwealth and Colonial Law* (London; 1966) at 908, that 30 November 1838 "is still treated by the Islanders...as signifying their incorporation in the British Empire."

[47] There followed, until the removal to Norfolk in 1856, a number of visits by Royal Navy ships, their captains administering justice, providing advice, and sometimes supplies and medical aid. Frequency varied, but visits were initially annually, on Admiralty orders.

[48] The Public Defender argued that, if this act of taking possession was intended to have force and effect to create a particular relationship, it was not subsequently notified or confirmed by the British Government. He argued the British Government is therefore estopped in law and equity from claiming that anything arising out of Captain Eliott's actions in 1838 brought about a recognisable relationship. Further, it was said that the acceptance of help, from time to time, from captains of British warships did not create any such relationship.

[49] The Public Defender pointed to the adoption by the Islanders of the laws drafted by Captain Eliott as a sign of civilised self-government by a people able to sustain their independence. He said the visits by warships were in reality quite rare and had only occasional impact on the daily life of a very remote community. If they were not British subjects, if the Crown had not formally claimed the territory, if they had a civilised government and were independent people, then it was not a British settlement in respect of which the UK Government could later claim sovereignty, it was submitted.

[50] In 1853, the Islanders appeared to seek the status of a British colony in correspondence forwarded to Queen Victoria over the signature of Arthur Quintal, Chief Magistrate.

[51] Taken from the Rev. Thomas Boyles Murray's well-known text, *Pitcairn: the Island; the People; and the Pastor* (London; 1909) at 209, is this letter, written on Pitcairn Island, 27th July 1853:

> May it please your Majesty,
>
> We, your Majesty's loyal and devoted subjects the inhabitants of Pitcairn's Island, avail ourselves of an opportunity just offered us, to assure your gracious Majesty of our loyal attachment to your person and Government.

The recollection of the visits of your Majesty's ships to our island will be preserved with pride and gratitude; and we desire to express, in the most unqualified manner, our thanks for these gracious marks of royal favour. We humbly trust we may be allowed to consider ourselves your Majesty's subjects, and Pitcairn's Island a British colony, as long as it is inhabited by us, in the fullest sense of the word.

Several years since, the Captain of your Majesty's ship *Fly* took formal possession of our little island, and placed us under your Majesty's protection. And if your Majesty's Government would grant us a document, declaring us an integral part of your Majesty's dominions, we should be freed from all fears (perhaps groundless) on that head; and such a gracious mark of royal favour would be cherished by us to an exertion in the discharge of the various duties incumbent on British subjects.

The Commander-in-Chief for the time being in the Pacific Ocean has permitted a ship of war to visit us occasionally; and we humbly trust your Majesty will be pleased to permit those visits to be continued, if your Majesty's Government should think fit to remove us to some other place.

At the suggestion of our worthy benefactor, Rear-Admiral Moresby, we have ventured to present your gracious Majesty with a small chest of drawers of our own manufacture from the island wood. The native name of the dark wood is Miro. The bottoms of the drawers are made of the bread-fruit tree. Our means are very limited, and our mechanical skill also; and we shall esteem it a great favour if your Majesty would condescend to accept of it as a token of our loyalty and respect.

In conclusion, we beg to add our earnest desire and prayer that your Majesty may long live to govern those whom God has placed under your Majesty's care and protection. That He may strengthen, protect, and prosper you, is the earnest desire of your Majesty's loyal and devoted subjects, the inhabitants of Pitcairn's Island.

Signed etc...
Arthur Quintal,

Chief Magistrate

[52] Mr Toup Nicholas, on behalf of the Secretary of State and when addressing the possible move to Norfolk Island, replied on 6th October 1854. He said:

My Dear Friends,

On the 5th of July I addressed a letter to you acquainting you that Her Majesty's Government had acceded to your request of being removed to Norfolk Island and that they would provide a vessel which should call off your Island towards the close of the present year for the purpose of carrying out that removal.

I have received a subsequent dispatch on the subject from the Earl of Clarendon who directed me to acquaint you that Norfolk Island will not be evacuated by its present occupants so soon as

was expected and that consequently it has become necessary to postpone for the present any measures for providing a vessel to remove the Pitcairn Islanders to Norfolk Island.

The Earl of Clarendon has lately received a copy of a Memorial addressed by the Pitcairn Islanders to the Queen requesting to be furnished with a document declaring them to be under Her Majesty's protection and constituting Pitcairn's Island a British possession.

The manner in which England has always responded to the Pitcairn Islanders as claimed by them as their Fatherland is the best proof no doubt has ever existed as to the sovereignty of your Island and will I trust be accepted by you as a sufficient answer.

It is, I am sure unnecessary for me having dwelt on the subject in my last letter, again to direct your attention to the interest with which you have always been regarded by Her Majesty's Government, indeed, it was in consequence of the interest, so felt that measures were determined upon to provide for your removal to Norfolk Island.

Believe me to be, etc...

[53] Despite this correspondence, the Public Defender submitted that the Pitcairn Islanders have never effectively claimed a relationship with the British Government or its Monarchs which would support jurisdiction being exercised over them. In relation to Mr Toup Nicholas's letter, he maintained that no formal reply or acceptance of the Chief Magistrate's request ever came directly from Her Majesty.

[54] The Public Prosecutor pointed to entries in the Pitcairn Register as confirmation of the Islanders' recognition of the Sovereign as their protector, relating to the observation of the Queen's birthday, the use of the Union Jack on all "grand occasions", and other occasions when loyalty to the Crown was expressed by the population.

[55] We will discuss later in this decision the legal underpinning for our conclusion. It is sufficient to say at this point that we see in the occupation of the Island by British subjects, the adoption of local laws with final accountability to visiting Royal Navy captains, the attention given by Her Majesty's ships, and the frequent expressions of loyalty, the factual basis for our view that up to 1856 Pitcairn was a British settlement and a possession of the British Crown.

iii) The 1856 Removal of Pitcairn Islanders to Norfolk Island.

[56] By 1855, the population of Pitcairn had reached 187, and was steadily growing. McLoughlin says that fears began to be expressed among the Islanders that the smallness of the Island, and the shortage of arable land, might jeopardise their new found standard of living. This is illustrated in the following letter, cited in Rev. Murray's text, at 202–203, sent by the Island's leading citizens to Rear-Admiral Fairfax Moresby. It will be noted that this letter was written prior to previously quoted correspondence.

Pitcairn's Island, May 18th, 1853

Honoured Sir,

> We, the undersigned Magistrate and Councillors of Pitcairn's Island, having, according to your request, convened a public meeting of the inhabitants of this island, have the satisfaction to inform you that, as regards your wise proposition for the amendment of certain laws relative to the duties of the Chief Magistrate, the age at which he and his councillors are eligible to hold such offices, etc., etc., we, together with the rest of the community, do unanimously and fully acquiesce in your opinion, and will lose no time in attending to all your kind suggestions.
>
> As regards the necessity of removing to some other island or place, it is very evident that the time is not far distant when Pitcairn's Island will be altogether inadequate to the rapidly increasing population; and the inhabitants do unanimously agree in soliciting the aid of the British Government in transferring them to Norfolk Island, or some other appropriate place; and desire that the funds which you have so benevolently and condescendingly (with the assistance of other benefactors) collected in England for the benefit of this community, should be reserved and appropriated in assisting them in such a step whenever it should become necessary.
>
> With high sentiments of gratitude and respect, permit us, in the name of the community, to subscribe ourselves,
>
> > Your obedient, very humble servants etc...
> >
> > Arthur Quintal, Chief Magistrate.
>
> Thomas Buffett, 1st Councillor.
>
> Edward Quintal, 2nd Councillor.

[57] It can be seen that the Islanders gave consideration to the prospect of moving to a larger Island – Norfolk. In fact, they left Pitcairn in 1856, and for three years the Island was unpopulated. Very few ships called and, sadly, the once thriving fruit and vegetable trade inevitably died away. In 1859, some of the Island families returned, to be followed by others in 1862. The majority of the former inhabitants remained on Norfolk.

[58] The kernel of the Public Defender's argument was that, if Pitcairn was indeed a British settlement prior to 1856, it ceased to be so once the Islanders left for Norfolk Island, as there was no subsequent "act of settlement" upon their return by which Britain could once again bring Pitcairn within her jurisdiction.

[59] The Public Defender contended that where a territory is occupied by a population or community, the concept of possession is related to those inhabitants, not the land involved. Jurisdiction (including the power to legislate and enforce laws), it was argued, relates to the inhabitants, rather than to the actual areas of land.

[60] The Public Defender asserted, at page 8 of his submissions:

> If formal possession is taken of uninhabited land it is only effective if in the long run it is occupied by people. Where such people are British subjects at the time they "plant" a settlement, their occupation is called a "British Settlement" or "plantation."

[61] It was further said by the Public Defender that the taking of possession of a place, or people, or the act of settlement, occurs at a definable date, with the occurrence of recognisable events. A possible exception was said to arise on the question of usage or sufferance, but even then there comes a time when this usage gels to the point where it may be said by its "weight and significance" an act of settlement has occurred.

[62] As an illustration of the concept of "possession", the Public Defender quoted the memorandum of 9 August 1722 by the Master of the Rolls reporting on a determination by the Lords of the Privy Council. It is recorded in *Case 15* De Term. S. Trin 1722, and the germane part reads:

> 1st That if there be a new and uninhabited country found out by English subjects as the law is the birth right of every subject, so where ever they go, they carry their laws with them and therefore such new found country is to be governed by the laws of England; though after such country is inhabited by the English, acts of parliament made in England without naming the foreign plantations will not bind them...

[63] Other cases given to illustrate these principles are *Campbell v Hall* [1774] EngR 5; 1. Cowp. 204, *Rex v Vaughan* 4 Burr 2005, *Spragge v Stone* Doug. 38 and *Attorney-General v Stewart* 2 Mer 463.

[64] The Public Defender raised a collateral argument that, because the Governor of New South Wales was appointed with not only the usual delegation from the Queen to legislate for Norfolk Island, but also with the added instruction to refrain from making any laws other than those desired by the Pitcairners, Her Majesty had exhausted her lawful powers. The Public Defender challenged the right of the Queen to make Orders in Council revoking the applicability of these laws, on the basis of the law as laid down in *Campbell v Hall*, and by allowing the Pitcairn laws to apply to them from 1856 onwards. As to this, reference needs to be made to the letter from Governor Denison to Selwyn, Bishop of New Zealand, dated 16th June 1856:

> My Dear Lord,
>
> While thinking over the subject of our conversation on Friday last, I have been led to the belief that I did not make my views with regard to the Pitcairn Islanders as clear as I might have done. I have thought it better, therefore, to state them in writing in order that you might not be led astray with regard to them by a misconception of expression used by me in conversation.
>
> The wishes of Her Majesty's Government, as communicated to me, not only in despatches from the Secretary of State, but also by a verbal message from Mr Labouchere are, that these islanders should be left as much as possible to themselves; that no interference should take place with the rules under which they have hitherto been living; that, in point of fact, they should be enabled to carry out at Norfolk Island the same primitive or patriarchal system which has produced such good effects upon their moral conduct at Pitcairn's Island.
>
> ... ...
>
> Believe me, etc...

[65] This letter may indicate the subject has been overstated, but the Public Defender has conceded it is

not necessary for the Court to make any determination on this point, and we make mention of it only for completeness.

[66] On the day the first of the families returned home, in 1859, the French ship *Josephine* arrived at Pitcairn Island. The argument made assumes the French to have considered the Island to have been abandoned by the British. However, it is recorded that upon learning the Island was a British settlement, the French Captain made his apologies and returned from whence he came. This is, of course, mere historical narrative, and we again address the point simply because it was raised.

[67] The mode of acquisition of territory under discussion in this case is that of settlement by British subjects in a place where no civilised government or legal system existed. Though petraglyphs at Downrope testify to previous Polynesian settlement, when the *Bounty* arrived at Pitcairn's Island it was *terra nullius*. Had this arrival been a colonising project undertaken with the prior authority of the Crown, the settlers would have taken possession on behalf of the Crown, and the territory would have readily been seen to be a part of the Queen's dominions. As Lord Denning MR said in *Sabally and N'Jie v HM Attorney-General* [1964] 3 W.L.R. 732, 744:

> When English folk settled in a colony (as distinct from conquest or cession) they took their English law with them, that is to say, the common law and the statute law as it existed at that time. They took with them too, the Crown prerogative, in this sense, that the Crown could give them a representative legislature in which they elected their own representatives: but the Crown could not impose on the settlers a legislature on which they were not represented. It could not impose on them a non-representative legislature.

[68] However, Pitcairn was not originally settled with Crown authorisation. For eighteen years the fact of settlement was unknown. Settlement was a private venture, one of three cases of unauthorised British settlements, the others being British Honduras and Tristan da Cunha (Roberts-Wray p.101). But private settlement at least carries a right capable of being converted into title by the exercise of the Crown's legislative power or other formal act. Such was the case in *Attorney-General of British Honduras v Bristowe* (1880) 6 App. Cas. 143, where British Honduras became a colony in 1862, but the Crown was held to have assumed territorial dominion in 1817, when some Crown grants of land were made. The words of Lord Mansfield in *Campbell v Hall*, relied on by the Public Defender, that "no colony can be settled without authority from the Crown", have been doubted as a correct statement of law since pronouncement, including by their author.

[69] Pitcairn Islanders, assisted by visiting naval officers, maintained lawmaking bodies without specific authorisation from the Crown for most of the 19th century. Settlers in their situation are said to

> ...remain in the allegiance and under the protection of the Crown and within the jurisdiction of the mother country: they have no constitutional right to establish a separate independent state, and they acquire sovereignty, if at all, on behalf of the Crown. (Roberts-Wray, p.100.)

[70] The argument raised by the Public Defender challenges the continuation of such a situation after the removal to Norfolk. The return of some families was undertaken privately and not as part of any project of Governor Denison. The removal constituted an abandonment, it was argued.

[71] At international law, a mere hiatus in administration and settlement does not affect the persistence of sovereignty (see, for example, D P O'Connell, *International Law* (Vol 1, 444)). There is a

presumption against abandonment in the absence of it being formal and unambiguous. However, here we are dealing with the fact of settlement, and the question of whether it resumed in a form in which it could be called a "British settlement".

[72] As the Prosecutor replied, the people who returned were unambiguously British subjects, and we agree, notwithstanding the Defender's categorisation of them as 'denizens' temporarily enjoying the protection of the Crown while on Norfolk Island. The whole population moved to Norfolk Island. They went as British subjects. They were British subjects while there. They returned as British subjects. They continued as before. There was merely a short hiatus in settlement. There was no formal or unambiguous abandonment of Pitcairn, because the settlers returned.

[73] Perhaps the learned authors of *Halsbury's Laws of England* (4th ed; Vol 6, para 979) should have the last word:

> A settled colony re-conquered or ceded back after conquest or cession does not lose its status as a settled colony.

[74] Pitcairn was not a colony by 1864, but the analogy is unmistakable. There existed here a hiatus in settlement, not a change of status. Even had Pitcairn become *terra nullius* again, it would have been resettled by British subjects.

[75] We conclude that, at law, British settlements do not need to be continually inhabited. However, if we are wrong in our conclusion, we are satisfied that events subsequent to 1864 would have overcome any break in the chain of settlement and possession.

iv) Civilisation & Religion in the Late 19th Century

[76] Another of the Public Defender's submissions necessitates consideration of the religion of the Islanders. From about 1850 onwards, it is recorded that the Pitcairn Islanders adhered strictly to one religious faith or another. At first, it was the Church of England faith. Indeed, Her Majesty Queen Victoria once called the Islanders a "perfect and pious" race of people. Then, in the early 1890s, the community converted to the Seventh Day Adventist faith.

[77] This commitment to and practice of Christianity, it was argued by the Public Defender, had a positive effect of a civilising nature on the community. He argued that the Queen could not have failed to recognise the beneficence of this situation, and therefore the civilised nature of the Islanders. The issue of whether there was a civilised government is important, as the preamble to the British Settlements Act 1887, to which we will shortly refer, speaks of settlement in places where there is no civilised government.

[78] Clearly, there was some lawlessness on the Island in the 18th century. The issue is one of there being a civilised government, however, not the state of the people living under it.

[79] Relying on the Queen's oaths of office and the Union with Scotland Act 1706, the Public Defender argued that the requirement for Her Majesty to carry out her sworn duties in a British settlement or possession as to the Church of England would have precluded the claim that Pitcairn was under her protection, from the time the Islanders changed religions.

[80] Given the diversity of religious faith amongst the Queen's subjects throughout the world, we have difficulty in accepting this aspect of the Public Defender's argument.

v) The British Settlements Acts 1887 & 1945

[81] Before us an interesting argument was developed as to the political or diplomatic reasons why the British Settlements Act 1887 and certain subsequent subordinate legislation was enacted. We think that has no bearing on the legal consequences of the legislation and refrain from comment. The 1887 Act was a successor to similarly named Acts of 1843 and 1860 with very little change of substance. The principal purpose of these Acts was to alter the common law rule that in a colony acquired by settlement the Crown can set up a constitution, but cannot enact legislation of other kinds (Roberts-Wray, p.166).

[82] The Crown claims to have acquired sovereignty by virtue of Pitcairn being a settlement in the sense required by the 1887 Act, through Orders in Council subordinate to that Act of 1893 and 1897, as we shall shortly discuss. The relevant parts of the Act (and the 1945 amendment Act) are recited as follows:

British Settlements Act 1887

An Act to enable Her Majesty to provide for the Government of Her Possessions Acquired by Settlement. [16th September 1887]

WHEREAS divers of Her Majesty's subjects have resorted to and settled in, and may hereafter resort to and settle in, divers places where there is no civilised government, and such settlements have become or may hereafter become possessions of Her Majesty, and it is expedient to extend the power of Her Majesty to provide for the government of such settlements, and for that purpose to repeal and re-enact with amendments the existing Acts enabling Her Majesty to provide for such government:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

(1) This Act may be cited as the British Settlements Act 1887.
(2) It shall be lawful for Her Majesty the Queen in Council from time to time to establish all such laws and institutions, and constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts and for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlement.
(3) It shall be lawful for Her Majesty the Queen from time to time, by any instrument passed under the Great Seal of the United Kindgom, or by any instructions under Her Majesty's Royal Sign Manual referred to in such instrument as made or to be made, as respects any British settlement, to delegate to any three or more persons within the settlement all or any of the powers conferred by this Act on Her

Majesty in Council, either absolutely or subject to such conditions, provisions, and limitations as may be specified in such instrument or instructions.
Provided that, notwithstanding any such delegation, the Queen in Council may exercise all or any of the powers under this Act: Provided always, that every such instrument or instruction as aforesaid shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively.
(4) It shall be lawful for Her Majesty the Queen in Council to confer on any court in any British possession any such jurisdiction, civil or criminal, original or appellate, in respect of matters occurring or arising in any British settlement as might be conferred by virtue of this Act upon a court in the settlement, and to make such provisions and regulations as Her Majesty in Council may think fit respecting the exercise of the jurisdiction conferred under this section on any court, and respecting the enforcement and execution of the judgments, decrees, orders, and sentences of such court, and respecting appeals therefrom; and every Order of Her Majesty in Council under this section shall be effectual to vest in the court the jurisdiction expressed to be thereby conferred, and the court shall exercise the same in accordance with and subject to the said provisions and regulations: Provided always, that every Order in Council made in pursuance of this Act shall be laid before both Houses of Parliament as soon as conveniently may be after the making thereof.
(5) It shall be lawful for Her Majesty the Queen in Council from time to time to make, and when made to alter and revoke, Orders for the purposes of this Act.
(6) For the purposes of this Act, the expression "British possession" means any part of Her Majesty's possessions out of the United Kingdom, and the expression "British settlement" means any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession.

... ...

British Settlements Act 1945

An Act to enable the powers conferred by the British Settlements Act, 1887, on His Majesty in Council to be delegated as well by Order of His Majesty in Council as by an instrument passed under the Great Seal of the United Kingdom, and to amend the provisions of that Act with respect to the persons to whom those powers may be delegated. [10th December 1945]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: -

> (1) Section three of the British Settlements Act, 1887, (which empowers His Majesty, by any instrument passed under the Great Seal of the United Kingdom or by any instructions under His Majesty's Royal Sign Manual referred to in any such instrument as made or to be made as respects any British settlement, to delegate to any three or more persons with the settlement all or any of the powers conferred by that Act on His Majesty in Council), shall have effect as if –
>
> (a) any reference therein to an instrument passed as aforesaid included a reference to an Order of His Majesty in Council; and
>
> (b) for the reference therein to any three or more persons within the settlement there were substituted a reference to any specified person or persons or authority.
>
> (2) This Act may be cited as the British Settlements Act, 1945, and the British Settlements Act, 1887, and this Act may be cited together as the British Settlements Acts, 1887 & 1945.
>
> ... ...

[83] In s 6 of the 1887 Act, a British possession must be one which was not acquired by cession or conquest. (Counsel were agreed that the Island was taken neither by cession or conquest.) It must be outside the United Kingdom, and must not be under the jurisdiction of the Legislature of any British possession. If these criteria are met, the Sovereign has acquired a British settlement in terms of the 1887 Act. Her Majesty in Council may make laws and constitute courts as may appear to be necessary for the peace, order and good government of her subjects, as well as others living in the settlement.

[84] The British Settlements Act 1887 enables Her Majesty to provide for the government of her possessions "acquired" by settlement. Logically, there is no need to apply the settlement analysis each time the Queen wishes to make Orders in Council. Once it has been established that the Island was a settlement, Her Majesty in Council is free to make laws "from time to time." It is equally clear that Her Majesty the Queen in Council may legislate not only for Her Majesty's subjects, but for "others within any British settlement."

[85] We consider there to be several ways in which Pitcairn Island could be recognised as a British settlement or possession: it was not acquired by cession or conquest; it was not for the time being within the jurisdiction of the Legislature; there were no indigenous Islanders; settlement was by British subjects; a chain of British connection existed over time; and there was expressed and actual loyalty to the British Crown. There is yet another reason, which is that Pitcairn is a British settlement or possession because the Executive has by Orders in Council told us so.

[86] The Public Prosecutor submitted that, regardless of events prior to 1887, there can be no possible challenge to the validity of the British Settlements Acts of 1887 & 1945, because both are statutes passed by the Sovereign Legislature of Great Britain, and enforceable by the courts pursuant to the doctrine of Parliamentary sovereignty. It was argued as being a fundamental proposition that courts will uphold duly enacted legislation without an inquiry into the Legislature's authority. The Privy Council decision of *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) supports the contention that even mistake or fraud will not invalidate an Act of Parliament. Their Lordships state at 595:

> [I]t is not open to the Court to go behind what has been enacted by the Legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by some one on whom reliance was placed by it. *The Court must accept the enactment as the law unless and until the Legislature itself alters such enactment, on being persuaded of its error*. [Emphasis added]

[87] Similarly, in *Labrador Co v The Queen* [1893] AC 104 at 123, the Privy Council said:

> The Courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination.

[88] While this is sound (and trite) constitutional principle, it is perhaps misapplied in the present context. Unlike with the Orders in Council of 1952 & 1970, the Public Defender was not challenging the validity of the British Settlements Act 1887, just whether Pitcairn qualifies as a settlement. He submitted that the Islanders were already a civilised community, governing themselves under their own law. Therefore, the requisite absence of a "civilised government", under the 1887 Act, could not have been fulfilled. At least, this is how we understand the arguments to have been developed.

[89] We were urged to infer, by the Prosecution, that the so-called "government" in place in 1887 was simply the basic system of laws put into place by Captain Eliott. The Constitution and Code of Laws was post-settlement, occurring at the Islanders' request in 1838.

[90] We consider that, in order to qualify as "civilised", a government must have certain characteristics. The most obvious of these would be: the requirement of sovereignty; the ability to trade with other Governments; and international recognition as being legitimate. Certainly, it would not be one born of a patriarchal community, involving private rules in the sense of those applying in Pitcairn, both before and after the removal to Norfolk Island.

[91] In any event, the expression "civilised government" comes from the preamble to the Act and thereby has a very limited role in statutory interpretation: *Norwhale v Ministry of Defence* [1975] QB 568; *A.G. v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49, 55 (HL) per Viscount Simonds.

[92] In *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, Laws LJ said, at p.19:

> The question always is what is the scope of the right? Where the enacting words express the scope intended, so as to leave no doubt upon the question, that will be an end of the matter; there is no ambiguity... and no appeal to preambles will avail to deny the right.

[93] We do not accept that an ambiguity exists requiring resort to the preamble, but conclude that even if consideration is given to the nature of civilised government, the limited constitution provided by the Royal Navy, and supervised from time to time, sometimes lamentably with long delays between ships, does not qualify as a civilised government of a kind contemplated by the British Settlements Act 1887.

[94] This enactment opened the way to draw Pitcairn into the legal and governmental framework of the British Crown, Pitcairn already being a British settlement or possession. We hold that Pitcairn was

such an entity in 1887. Even if that be wrong, by virtue of subsequent acts of State which will shortly be discussed, any defects in the chain of evidence towards title would have been rectified.

vi) A New Constitution, Lines in the Pacific & Subsequent Delegations

[95] The 1890s saw the enactment of several Imperial instruments having importance in this case. The first of these was the Foreign Jurisdiction Act 1890, the relevant portions of which we set out here:

> **Foreign Jurisdiction Act 1890**
>
> An Act to consolidate the Foreign Jurisdiction Acts. [4th August 1890]
>
> WHEREAS by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of Her dominions:
>
> Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:
>
> (1) It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.
>
> (2) Where a foreign country is not subject to any government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction or Her Majesty in a foreign country within the meaning of the other provisions of this Act.
>
> ... ...

[96] On 3rd October 1892, Captain Rookes arrived at Pitcairn aboard HMS *Champion*, and a decision was made to re-organise the Island's system of laws. The "Laws and Regulations of the Pitcairn Islands" were adopted by the Islanders on 1st January 1893. These laws put in place a system of government along with a new constitution.

[97] Based on the changes adopted as a result of Captain Rookes's visit, the Public Defender stressed to the Court that at the time the Pacific Order in Council issued (March 1893), purportedly pursuant to the British Settlements Act 1887, Pitcairn had a civilised government with a Legislature in place and with courts competent to enforce the laws. The argument that Pitcairn had a civilised government, in the present context, appears to have been made in relation to s 2 of the Foreign Jurisdiction Act 1890, which provides that a foreign country must not have been "subject to any government." Consistent with our findings above, the same considerations as those given to the equivalent argument under the 1887 Act apply to the "subject to any government" issue in relation to the 1890 Act.

[98] The Pacific Order in Council 1893 (which extended British jurisdiction to islands in the Pacific Ocean, but not on the face of it Pitcairn) takes its validity not only from the Foreign Jurisdiction Act 1890, but also from the British Settlements Act 1887. The 1893 Order relied principally on ss 2 & 6 of the British Settlements Act 1887 for its efficacy and legality in so far as it applied to British settlements, and upon the Foreign Jurisdiction Act in so far as it applied to British subjects in foreign countries.

[99] Her Majesty, by virtue of the Foreign Jurisdiction Act 1890, exercised jurisdiction over her subjects living in such a foreign country, and every act done in pursuance of any jurisdiction of Her Majesty "shall be as valid as if it had been done according to the local law then in force in that country."

[100] Nevertheless, the Public Defender argued that the phrase "other lawful means" in the 1890 Act's recital must be read *ejusdem generis* with the preceding specific words forming a class, which it was said relate to the actions of the inhabitants, as opposed to those of the Queen. The Foreign Jurisdiction Act relevantly recites:

> Whereas by treaty, capitulation, grant, usage, sufferance and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries...

the Queen shall enjoy jurisdiction over a foreign country "as if" the country had been acquired by cession or conquest.

[101] We agree that "cession", or the "yielding up of property rights", means something other than capitulation or granting property rights in the context of this Statute. However, capitulation can be taken to mean "acquiescence", and it is clear that the Islanders did so capitulate in relation to British laws and governance.

[102] The Public Defender argued that the primary purpose of the Pacific Order in Council was to confer jurisdiction on the Queen over British subjects within a foreign country. We note it is the Foreign Jurisdiction Act 1890 that talks of jurisdiction over "subjects", not the Pacific Order in Council of 1893. It is the 1887 Act which confers on Her Majesty jurisdiction over not only her subjects, but also "others" within a British settlement.

[103] Despite having indulged the above strands of argument, we do not accept the Public Defender's submission relating to the Foreign Jurisdiction Act. The British Settlements Act provides jurisdiction for the Queen to make laws for the peace, order and good government of her settlements. Pitcairn in our view was a British settlement in 1893, when the Order in question was made. We consider this to be the end of the matter.

[104] The Public Defender contended that the notation in *Halsbury's* (1st ed, in the section dealing with constitutional law, para 692), which states that jurisdiction over foreigners is not normally claimed in a "British protectorate" without the consent of the foreigners and their Government (if they have one), must be read in light of the Berlin Convention 1885, from which came the word "protectorate", being areas over which a large power had "spheres of influence." He submitted that Pitcairn Island was not a protectorate in March 1893, and there must be considerable doubt as to whether at that time it could be said to be under the protection of Her Majesty Queen Victoria.

[105] In a similar vein, the Public Defender argued that, while Her Majesty in the Order in Council of 1970 referred to Pitcairn, Henderson, Oeno and Ducie Islands as dependencies, this categorisation was not effective to make them such.

[106] We were referred to *Nyali v Attorney-General* [1956] 1 QB 1, at 17, as to the difference between protectorates and colonies, and the extent of actual power over each:

> The difference in law between Kenya Colony and Kenya Protectorate is this: In Kenya Colony the jurisdiction of the British Crown is unlimited; but in the Kenya Protectorate it is only limited.
>
> [And]
>
> Although the jurisdiction of the Crown in the protectorate is in law a limited jurisdiction, nevertheless the limits may *in fact* be extended indefinitely so as to embrace almost the whole field of government. *They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area, leaving only the title and ceremonies of sovereignty remaining in the Sultan*. [Emphasis added]

[107] Intriguing though these classifications are, the Public Prosecutor has neither argued that Pitcairn was a protectorate nor a dependency. Just as the Foreign Jurisdiction Act 1890 did not apply to Pitcairn, nor did the technical classification of "protectorate".

[108] Another argument was that in leaving Pitcairn Island out of the operation of the Pacific Order in Council 1893, Queen Victoria was acting legally and in accordance with the actual situation she knew to be in place on Pitcairn Island. Articles 4 & 6 set out limits over which and to which the Order in Council 1893 applied in the Pacific Ocean. To qualify, an island or place had to come within the geographical limits set out in the articles. Pitcairn, because of its location, did not come within the definition. The Public Defender relied on art 6(2), which described as parts of the limits:

> (2) Any seas, islands, and places which are not excluded by the 4th Article of this Order, and are situate in the Western Pacific Ocean, that is to say, within the following limits: - North, from 140° east longitude by the parallel 12° north latitude to 160° west longitude, thence south to the Equator, and thence east to 149° 80' west longitude; East, by the meridian of 149° 80' west longitude; South by the parallel 30° south longitude;
>
> ... ...

We accept that in 1893 Pitcairn Island was situated outside this particular geographical description.

[109] In 1898, the Secretary for State for the Colonies, Joseph Chamberlain, extended the Pacific Order in Council 1893 to include "the British settlement known as Pitcairn Island." As the Instructions are brief, we set them out in full:

> **Instructions to the High Commissioner Western Pacific**
>
> Under and by virtue of the provisions of Articles 4 & 6 of the Pacific Order in Council, 1893, -

> I, the Right Honourable Joseph Chamberlain, Her Majesty's Principal Secretary of State for the Colonies, do hereby direct that jurisdiction under the said Order in Council shall be exercisable in relation to the British Settlement known as Pitcairn Island, situated in the Pacific Ocean, in Longitude 130° 6' W., and in Latitude 25° 3' S.
>
> And I hereby further direct that these Instructions shall be published in the Government *Gazette* of Fiji, and in the manner specified in the 146th Article of the said Order in Council, and that all persons within the limits of the said Order in Council as hereby further defined shall govern themselves accordingly.
>
> As Witness my hand
>
> J. Chamberlain

[110] Again, in 1903, the (then) Secretary of State extended the Order to include, broadly, all British settlements within the Pacific Ocean. This direction was published in the Fiji Royal Gazette in 1903.

[111] The submission of the Public Defender raised the issue of whether the actions of Joseph Chamberlain, in June 1898, were effective to bring Pitcairn Islanders under the Pacific Order in Council 1893. The argument was that the Secretary of State did not have the legal power to amend an Order in Council, so as to make it apply to an island not previously within the limits created by the 1893 Order.

[112] The Public Prosecutor replied in relation to the boundary issue that, if this is at all relevant, the 1952 & 1970 Orders create no such boundaries, and it is this period of time with which we are dealing. The 1893 Order was revoked by the 1952 Order - consequently ceasing to exist by the time the allegations referred to in the charges would have occurred.

[113] The Prosecutor conceded that the Pacific Order in Council 1893, which was made pursuant to the 1887 Act, initially did not include Pitcairn. However, he submitted that the Order allowed the Secretary of State to extend the jurisdiction of the Order by instructions to the High Commissioner of the Western Pacific. As we have said in para 109, this occurred in 1898, when the Secretary of State for the Colonies directed that the Order be extended to include "the British Settlement known as Pitcairn Island." As a result, Pitcairn was brought under the jurisdiction of the High Commissioner on 3rd May 1898.

[114] The wording of each of these articles is important. Article 4 of the 1893 Order says:

> 4. The limits of this Order shall be the Pacific Ocean, and the islands and places therein, including –
>
> a) Islands and places which are for the time being British Settlements;

[115] And, the proviso to art 6 says:

> Provided that the Secretary of State from time to time, by any instructions given to the High Commissioner, and published as the Secretary of State thinks fit, may direct that jurisdiction

> under this Order may be exercised in relation to *any parts of the limits* of this Order *not* herein specified, or that *any part of the limits* of this Order shall, until otherwise directed, be excepted from the application of this Order. [Emphasis added]

[116] We agree that the Secretary of State may direct that jurisdiction shall be exercised over any "parts" of "limits" not included in the list in art 6 (ie, Pitcairn), the word "limit" appearing in art 4 and including a British settlement within the Pacific Ocean. While we accept that only the Queen could amend an Order in Council (ie, extend the "limits"), the Order allows the Secretary of State to extend the "parts" (providing they come within the "limits", one of which is being a British settlement in the Pacific Ocean). The 1898 delegation is an effective application of the 1893 Order in Council, to Pitcairn.

[117] Due to an increased interest by the Western Pacific High Commission in Pitcairn Island, along with a murder trial in 1897, a visit occurred by Mr Simons, the British Consul at Tahiti and a Deputy Commissioner for the Western Pacific. In 1904, he reported his observations in relation to the operation of the 1893 Constitution, set up by Captain Rookes, and commented that an array of petty crime continued and that he could say little in the Islanders' favour with regard to their morals. (See *Law and Order on Pitcairn's Island* (D McLoughlin (B.A., LL.B.)) at 35.)

[118] Simons proceeded to draft a new code of laws and system of government for the Island. This was to be the first time that Pitcairn was to have a code of laws which was devised by a civilian, rather than an officer of the Royal Navy, reflecting the consolidation of civil administration within British possessions.

[119] In relation to these constitutional changes, the Public Defender argued that although the Islanders, in 1904 by the unanimous voting of its electors, accepted the regulations and ordinances, that acceptance could not be regarded as giving up the right to self government.

[120] The local laws and regulations drafted by Simons, now in force, provided for all fines to be held at the disposal of the High Commissioner for the Western Pacific (*Harry Shapiro's Heritage of the Bounty, "Laws as Revised in 1904"*, r 18). Regulation 23 provided that they would come into force on 19th May 1904, but would be "subject to the concurrence and revision of His Majesty's High Commissioner for the Western Pacific." The revised Laws of Pitcairn specifically reserved the more important legislative and judicial powers to the High Commissioner for the Western Pacific. They remained in force for the next thirty six years.

[121] By the late 1930's, the laws and regulations were in need of review. Two officials, J S Neill in 1937 and H E Maude in 1940, were dispatched by the High Commissioner to draft and introduce a new code of laws appropriate for the modern Pitcairn. In 1940, regulations were made by the Western Pacific High Commissioner, which purported to confer jurisdiction on the Supreme Court of Fiji to hear appeals from Pitcairn. They provided, also, for a Court, an Island Council and the creation of various offences. The Pitcairn Government Regulations 1940 were not, it transpired, made pursuant to art 108 of the Pacific Order in Council 1893. They were subsequently declared invalid.

[122] It was not until the 1945 amendment to the British Settlements Act 1887, removing the original requirement that the person receiving delegation be "within the settlement", that the Crown's authority to make laws could be delegated to one person living outside of the settlement. Thus,

only after 1945 could the High Commissioner make regulations pursuant to art 108 of the Pacific Order in Council 1893. Even then, art 108 did not give him the power to constitute courts. (See *Re Floyd McCoy* (Supreme Court, Fiji, 14 July 1951, Vaughan CJ). Coincidentally, one of the findings of Vaughan CJ was that "Pitcairn is a British Settlement.")

[123] The answer, the Public Prosecutor contended, to remedy all of these pragmatic problems came in 1952, when the new Order in Council provided for the appointment of a Governor of Pitcairn who was empowered to make laws and constitute courts. The 1940 Regulations were then re-enacted by the Governor as an Ordinance.

[124] Leaving aside the finding by Vaughan CJ in *McCoy*, that the 1940 Regulations were not lawfully issued, the Public Defender submitted they were effectively accepted and adopted by the Pitcairners as laws governing them. (This acceptance was, for obvious reasons, not disputed by the Public Prosecutor.) Curiously, it was further submitted by the Public Defender that, if these laws are considered valid, then the Pitcairn Island (Local Government Regulations) Ordinance 1952, issued out by the Governor of Fiji (then also Governor of Pitcairn), pursuant to the Pitcairn Ordinance 1952, appears to recognise the situation that all regulations made from and including 1940 by the Western Pacific Commissioner were deemed to have the force of law in Pitcairn Island. Reference is made to this situation by the Public Defender to illustrate the extent to which the Pitcairn community had advanced its self government, and not to in anyway accept the validity of these laws. For our part, we think the validity to be all encompassing, and not existing for a particular purpose suitable to the Public Defender. Moreover, the self government issue is time specific, and ceases to be relevant in the 1950s.

vii) Sovereignty, Legitimacy & Acts of State

[125] In answer to all of the Public Defender's contentions so far advanced, the Public Prosecutor responded superficially. His principal argument was that the chain of authority for all laws in Pitcairn derives ultimately from the British Settlements Acts of 1887 & 1945. There was simply no need to examine history, or to trace the development of the Island community. The statutes were the starting point, followed by the Orders in Council and ultimately the local Pitcairn Island ordinances.

[126] Nevertheless, the Public Defender maintained his argument that the Pitcairn Orders of 1952 & 1970 were invalid and unlawful exercises of power by Her Majesty Queen Elizabeth II as they derive their validity from the 1887 & 1945 Acts, which in turn required that Pitcairn be a British settlement.

[127] As alluded to earlier, the new Order in Council issued in 1952, expressly revoked the 1893 Pacific Order in Council. When Fiji gained independence, in 1970, a further Pitcairn Order was enacted, empowering the Queen to appoint a separate Governor of Pitcairn Island.

[128] The Prosecutor submitted that, pursuant to the Pitcairn Orders in Council 1952 & 1970, the Queen used her powers under the 1887 Act to appoint a Governor for Pitcairn, and to delegate her law-making powers to him (including the power to constitute courts). The constitutional position was that all the Governor's ordinances may be disallowed by the Queen through a Secretary of State. The Pitcairn Royal Instructions, created in 1970, were instructions from the Queen to the Governor, directing how ordinances ought to be made and constructed.

[129] The Public Prosecutor re-stated the main question for this Court as being: "was Pitcairn a British possession in 1952 & 1970?" The Prosecution submitted that Pitcairn was, and remains, a possession of the British Crown because: the British claim of jurisdiction has arisen because of acts of State, which are not open to challenge in the courts; and the legitimacy of the present legal regime can be independently established by virtue of its durability, efficacy and integrity.

[130] Two different types of act of State were examined. First, the acts of the British in settling Pitcairn as a colony. Secondly, the acts of State, in a literal sense, enacted by the Sovereign for the governance of Pitcairn. The Orders of 1952 & 1970 were contended to be in the latter category and, as such, beyond challenge by the courts. The former type of act of State, it was conceded orally, can in some circumstances be challenged, but the concept of Parliamentary supremacy makes the legislative type beyond reproach.

[131] The Public Prosecutor further submitted that all Pitcairn ordinances are valid, being made pursuant to the Orders in Council of 1952 & 1970, and stated that the test for validity of subordinate legislation passed under a general power to legislate for the "peace, order and good government" of a territory affords considerable deference to the legislator: *R v Fineberg* [1968] NZLR 119. In that case, Moller J quoted the following from *R v Burah* (1878) 3 AC 889:

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited...it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

[132] Reference was made by the Public Prosecutor to a number of other decisions. The "act of State" doctrine was applied in the High Court of Australia in *Coe v Commonwealth* [1979] HCA 68; (1979) 24 ALR 118, by Gibbs J, who said:

> The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, *were acts of state whose validity cannot be challenged*. [Emphasis added]

[133] In that case, there was a dispute in respect of the sovereignty over Australia by the Aboriginal nation. Jacobs J concluded that disputes over sovereignty are not "matters of municipal law but of the law of nations", and are not cognisable in a Court which takes its jurisdiction from the very sovereignty which is being challenged. To do so would be "embarrassing and cannot be allowed."

[134] In *Sobhuza v Miller* [1926] AC 518, at 523-525, the Privy Council said:

> In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to [as] an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890.
>
> ... ...

> In the *Southern Rhodesia* case Lord Sumner ... held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. *[This implies] that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be ... in law unquestionable*. [Emphasis added]

[135] In *Nyali v Attorney-General* [1956] 1 QB 1, at 15, Lord Justice Denning stated:

> The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus if an Order in Council is made affecting the protectorate, the court will accept its validity without question: see *Sobhuza II v Miller* [1926] AC 518, 528. *It follows, therefore, that in this case we must look not at the agreement with the Sultan, but at the Orders in Council and other acts of the Crown so as to see what jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown's jurisdiction. I turn, therefore, to consider them.*
>
> In the first place there is an Order in Council of 1920 which has brought the Kenya Protectorate very much within the orbit of Kenya Colony. The governor is also the governor of the protectorate and is entitled to all the powers of the Crown therein. The executive council of the colony is also the executive council of the protectorate. *The legislative council of the colony legislates, not only for the colony, but also for peace, order and good government of the protectorate. And so forth. None of those provisions can be challenged in the courts*. [Emphasis added]

[136] The dicta in *Nyali* indicates that not only are Orders in Council acts of State, but so are ordinances made (*intra vires*) by the Governor (here, this would be the Pitcairn Order in Council 1952), and as such are above judicial challenge. Lord Justice Atkin, in *The Fagernes* [1927] p 311, offers the following dicta:

> *What is the territory of the Crown is a matter of which the Court takes judicial notice...Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive*. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country. [Emphasis added]

[137] In *Post Office v Estuary Radio* [1968] 2 QB 740, Lord Diplock said:

> It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required. *The Queen's Courts, on being informed by Order in Council or by the appropriate minister or law officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it*. [Emphasis added]

[138] In our view, there can be no doubt that the Orders in Council made by the Queen in Council in 1952 & 1970 were acts of State in their own right. It is likely also, as contemplated by *Nyali*, that there were other acts of the Crown at various times in Pitcairn's history which can be called acts of State, going back to Captain Eliott and the *Fly* in 1838, having similar effect.

[139] As to the second issue, relating to durability, efficacy and integrity, the Prosecutor cited *R v Walker* [1989] 2 Qd R 79. In that case, a person living on Stradbroke Island submitted that the Queensland courts had no jurisdiction over him in respect of offences allegedly committed on the Island. The appellant submitted that the Island was inhabited by an Aboriginal group, known as the Nunukel people, and that these people possessed a system of government and laws prior to 1770. The submission essentially questioned the sovereignty of the State and its authority over the Island. McPherson J, at 83, had this to say about the nature of enduring, effective legal regimes:

> The question raised by the appellant in this case is one which the law does not attempt to answer. More accurately, it is one for which the courts, which administer the law, do not and in law are not required to respond except...to say that the obedience of courts to the law they apply is "simply a political fact": see HWR Wade, "The Basis of Legal Sovereignty" Cambridge Law Journal [1955] 177 at 189. The reason why courts give obedience to enacted law is that they recognise the law-making authority of the legislature that enacts it. It is, as Professor Wade observes, "the ultimate political fact upon which the whole system of legislation hangs": at 188. *Why courts recognise one particular legislative authority rather than another has much to do with the efficacy, within the territory in which the courts adjudicate, of the laws they obey and enforce*. "A legal order" says Kelsen "is regarded as valid if its norms are by and large effective": H Kelsen, "Pure Theory of Law" at 212, cited by R W M Dias, "Legal Politics: Norms Behind the Grundnorm" Cambridge Law Journal [1968] 233 at 237. *Whether a legal order is effective depends in turn upon a mixture of history, politics and general experience, of which courts may be conscious but into the details of which they do not delve as relevant adjudicative facts*.
>
> ... ...
>
> Professor Dias...reminds us that elements of durability and morality enter, or ought to enter, into the question of the efficacy of the legal order and the processes followed by courts in deciding whether or not to recognise a new legal order. *On this view what is sometimes called "legitimacy" as well as efficacy has a place in the processes of recognition*. [Emphasis added]

[140] It is worth noting that, unlike the Pitcairn Islanders, the Nunukel people were aboriginal people. Even the existence of tribal norms, values and systems are no challenge to the process of legitimacy and recognition of a Sovereign nation.

[141] The Public Prosecutor referred to the British Overseas Territories Act 2002 (UK), as further evidence of sovereignty over the Island. The Act changed the name of British Dependent Territories (British Nationality Act 1981, sch 6). Pitcairn, Henderson, Ducie and Oeno Islands are so listed.

[142] In *Governor of Pitcairn & Associated Islands v Sutton* [1995] 1 NZLR 426 (CA), the respondent who was a New Zealand citizen had been employed as a clerk in the Auckland office of the Governor of Pitcairn. The respondent brought personal grievance proceedings against the

Governor under the Employment Contracts Act 1991 (NZ). At first instance, the Governor unsuccessfully contested jurisdiction, claiming Sovereign immunity. He appealed.

[143] The Court held that the respondent's employment in the Pitcairn office involved her in the public acts of the British Crown. Therefore, to consider a claim of unjustifiable dismissal in the New Zealand courts would intrude on the exercise of the Sovereign functions exercised through the Governor of Pitcairn. The appeal was allowed.

[144] Cooke P stated, at 429:

> *Pitcairn is a British colony, and as such a British dependent territory within the Commonwealth. It is subject to the British Settlements Acts 1887 & 1945, under which the present constitution was made by the Pitcairn Order 1970 (SI 1970/1434).* The Order provides for the appointment of a Governor to hold office during Her Majesty's pleasure. Subject to disallowance by Her Majesty through a Secretary of State (and hence, in effect, British Government control), he has power to make laws for the peace, order and good government of Pitcairn and to constitute Courts. [Emphasis added]

[145] Cooke P considered that, pursuant to the 1970 Order, it "may be arguable that these provisions import the unfair dismissal provisions of the Employment Protection (Consolidation) Act 1978 (UK)." However, as the Court heard no argument to this effect, Their Honours expressed no opinion on it.

[146] Cooke P goes on to say, at 430:

> If there is any immunity it attaches to Her Majesty the Queen as Sovereign of the Colony of Pitcairn in respect of the administration on her behalf of the Government of Pitcairn. I would accept, however, that the Governor for the time being should be treated as a proper officer to claim immunity on her behalf and that the claim made by him should be so construed.

[147] Likewise in *Berkett v Tauranga District Court* [1992] 3 NZLR 206,212 Fisher J confirmed the authority of enduring government over claimed historical constitutional flaws, in a case where jurisdiction was challenged because sovereignty resided historically in indigenous people and Acts of State were said to be "vitiated by defects traceable to fraud, deception, absence of authority or error in the original proclamations." He said:

> The result up to this point is that there is an unbroken chain of constitutional authority for the statutes upon which the respondents now rely in this case - the New Zealand Boundaries Act 1863, the Crimes Act 1961 and the Territorial Sea and Exclusive Economic Zone Act 1977 – stretching back to the Imperial Parliament's assumption of power to legislate for the territories of New Zealand in the mid-19th century. For the final and crucial step, namely the acquisition of sovereignty by the Crown at the time, one must again venture beyond the reassuring confines of constitutional and domestic law as a closed system. The origins of that sovereignty are discussed by Richardson and Somers JJ in *New Zealand Maori Council v Attorney-General [1987] NZLR 641 at pp 671 and 690*. They refer to Hobson's proclamations of 1840 declaring the Crown's sovereignty over New Zealand, the approval of those proclamations by the Crown in London and the publication of the proclamations later that year in the London Gazette. The questionable nature of some of the assumptions at the time (whole of North Island ceded by the

> Treaty of Waitangi; South and Stewart Islands unoccupied by any Maori group capable of exercising sovereignty there; no presence capable of resisting acquisition by discovery) has not detracted from the general recognition afforded to the proclamations ever since. As Richardson J commented "It now seems widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of new Zealand by the Crown in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand". The same must apply to Mayor Island/ Tuhua.
>
> But in fact it is neither necessary nor permissible for a court to delve back into history to establish the pedigree of the New Zealand Parliament, or the territorial scope of its authority, for the purpose of assessing the validity of a current statute. Once Parliament passes or adopts a statute, the Courts must apply it. An assumed clash of sovereignties in the mid-19th century cannot provide the basis for challenging a New Zealand Act of Parliament.

[148] Sir Kenneth Roberts-Wray writes, in *Commonwealth and Colonial Law* (London; 1966), that there was an

> ...almost casual attitude to constitutional niceties in the early days of the British Empire, combined with empirical methods of development, notably Acts of Parliament (sometimes poorly drafted) tinkering with the law by dealing ad hoc with specific difficulties rather than with general principles, have succeeded in producing an overall pattern of complexity and obscurity.

[149] Colin Newbury (in his article on protectorates, in "W.P. Morrell: A Tribute" (Dunedin; 1973)) refers to a British official desire for minimum legal and financial responsibility. Yet clearly, as European imperial ambitions began to conflict as the 19th century wore on, legal arrangements became more formalised.

[150] This typical colonial pathway seems to us to have been also the Pitcairn experience. Whilst the Public Defender has been able to point out to us instances of disappointment on the part of residents for periods of Imperial neglect, or confusion on the part of some naval officers or civil servants as to the actual political status of Pitcairn from time to time, the inexorable move towards incorporation into the British legal system is firmly evident in the historical documentation produced to the Court. We do not seek to elevate any of these (save the statutory instruments) to the status of constitutional documents including those we have referred to in this judgment, but we have satisfied ourselves that their overwhelming flavour is that Pitcairn, a settlement under British protection became, with the support of its people, a British dependency or territory. Even so, we accept that the weight of authority requires us only to look to the extant statutory instruments to determine her present status.

[151] We hold that as a matter of municipal law the Orders in Council of 1952 & 1970 rule, and ordinances validly passed thereunder have force of law.

IV. SOVEREIGNTY IN THE INTERNATIONAL CONTEXT

[152] The Public Prosecutor's further submission relates to the realms of international law and the recognition of sovereignty. He provided the caveat that this is in response to the Public Defender's

submissions on the issue, and not because he is conceding that matters of international law are justiciable in this Court. While we concur with both parties that questions of international law are clearly *ultra vires* the jurisdiction of this Court (see *R v Coe, supra*), we propose to make reference to the principles concerned, by way of providing a context and because these issues were aired at the hearing.

[153] It has been put to us that there are five traditional modes of acquisition, which may overlap or blend into one another in practicality (Lee, "Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal" (2000: 16 Conn. J. Int'l L. 1.)). Indeed, Professor Joseph, in *Constitutional and Administrative Law in New Zealand* (2nd ed; 2001, at 32), describes the "haphazard fashion" in which sovereignty was acquired in New Zealand.

[154] Acquiescence and recognition by other States can be significant evidence of sovereignty, and these elements can operate, also, by way of estoppel (Lee, *supra* at 18). The Permanent Court of International Justice held in *Legal Status of Eastern Greenland (Den v Nor)* 1933 PCIJ No 43 that title by occupation involves two elements: intention to act as Sovereign; and some *de facto* exercise of authority. The importance of context was emphasised in *Islands of Palmas Arbitration* 2 RIAA 829 (1928) and *Western Sahara* (1975) ICJ 12.

[155] By way of illustration, there have been several decisions which demonstrate the ways in which sovereignty will be recognised at international law. In *Minquiers and Ecrehos* [1953] ICJ 47, the International Court of Justice held, *inter alia*, that the administration of judicial proceedings in respect of criminal offences committed on the Ecrehos was, in combination with other actions, sufficient to establish sovereignty by the British Government.

[156] The same principle has been applied in *Eastern Greenland*, *the Island of Palmas case and Clipperton Island* (26 Am, J, Int'l Law 390 (supp. 1932)), where actions such as making legislation on issues applicable to the area, the giving of Government assistance after a typhoon and a lieutenant claiming an island on behalf of the French Government all weighed in favour of sovereignty having been established.

[157] In applying the principles from the above cases, the Public Prosecutor submitted that British sovereignty is established in the same sorts of ways over Pitcairn. For example, the establishment of laws and courts, the machinery of Government, the provision of financial support, overseas recognition of British sovereignty by foreign States (including New Zealand and France), United Nations and European Union recognition of British sovereignty, the absence of competing claims to sovereignty and the recognition and acquiescence of the inhabitants of the Island.

[158] A further example is the Armorial Ensigns Instrument 1969, which was enacted in order to assign armorial ensigns "for the greater honour and distinction of Our Territory of Pitcairn." On 21st November 1970, His Royal Highness Prince Phillip visited Pitcairn. Stamps were issued, along with commemorating coins.

[159] Pitcairn Island recently took part in the Pacific regional seminar, held at Nadi, in Fiji (May 2002). The United Nations General Assembly welcomed Pitcairn and made recommendations to "the administering Power" in relation to improving its economic, social and educational conditions.

[160] Subject to the reservation that we have expressed in para 152, we would consider it firmly established that British Sovereignty over Pitcairn is recognised as a matter of international law.

V. HUMAN RIGHTS – INDEPENDENT AND IMPARTIAL TRIBUNAL – CONSTITUTION OF THE COURT

[161] It was accepted by the Crown that the UK Human Rights Legislation, where applicable, is relevant to Pitcairn and, in particular, the Human Rights Act 1998 (UK) and the European Convention on Human Rights and Fundamental Freedoms. However, it should be noted that the Human Rights Act 1998, and therefore the Convention, is subject to local conditions and the limits of local jurisdiction. The accuseds' committal for trial by a Magistrate, sitting as the Magistrates' Court on the Island, has been challenged by the Public Defender. He argued that the appointment of the Island's magistrates is "unlawful, illegal, invalid, null and void and had no force or effect." The corollary to this submission is that the deposition hearings, committing the accused for trial, are also null and void.

[162] Magistrates on Pitcairn are appointed by the Governor. Section 7 of the Pitcairn Order 1970 provides that the Governor may make appointments to office, and those persons who are so appointed to office, shall hold their office during Her Majesty's pleasure. By comparison, s 7 of the Pitcairn Royal Instructions 1970 states that every appointment made by the Governor shall, "unless otherwise provided by law, be expressed to be during pleasure only."

[163] The Public Defender raised the question of whether such appointments, held at pleasure, are conducive to the existence of an independent and impartial tribunal. He referred, in support of the above contention, to *Starrs v Ruxton* [1999] ScotHC 242; [2000] SLT 42; 2000 JC 208, and *Miller v Dickson* [2002] 1 WLR 1614 (PC).

[164] In the former case, two accused appeared for trial on summary complaint before a temporary Sheriff. The trial was adjourned, due to the coming into force of s 57 of the Scotland Act 1998, which provides that no member of the executive shall act in a way which is incompatible with any of the European Convention. Article 6(1) of the Convention provides, *inter alia*, that anyone charged criminally is entitled to a "fair and public hearing...before an independent and impartial tribunal established by law."

[165] The accused asserted that temporary sheriffs do not constitute independent and impartial tribunals. The High Court of Justiciary, in Scotland, sat to consider whether temporary sheriffs held security of tenure, and if not whether this lack of tenure compromised judicial independence.

[166] Their Lordships accepted that there can be no doubt as to the importance of security of tenure to judicial independence, and held that, while appointment by the Executive does not point towards any lack of judicial independence, the temporary nature of the Sheriffs' appointment does evidence a lack of independence.

[167] What is crucial, reasoned Lord Reid at 66, is that renewal is "both possible and expected, but is at the discretion of the executive." His Lordship declared, at 69, that:

> Judicial independence can be threatened not only by interference by the executive but also by a judge's being influenced, consciously or unconsciously by his hopes and fears to his possible

> treatment by the executive...The adequacy of judicial independence cannot appropriately be tested on the assumption that the executive will always behave with appropriate restraint.

[168] *Miller* followed *Starrs*. After the Scotland Act 1998 came into force, and the subsequent High Court of Justiciary decision, several persons who had been convicted and subsequently sentenced by temporary sheriffs wished to challenge the validity of those proceedings. The defendants' cases were selected to be heard as representative of the various factual situations involved.

[169] The Privy Council held that temporarily appointed sheriffs do not constitute an independent and impartial tribunal, despite there being no suggestion of actual bias or impartiality on behalf of the sheriffs involved. The Lord Advocate had, therefore, infringed the defendants' rights under art 6(1) of the Convention, by continuing to prosecute the defendants before a tribunal which was neither independent nor impartial.

[170] It may be seen, therefore, that the real issue is not that the appointments are made by the Executive, or even that these are made according to Her Majesty's pleasure, but that the continuation of certain judicial appointments is subject to the Executive's discretion.

[171] It is our opinion that the appointment of magistrates by the Governor of Pitcairn, at his pleasure, is a reference to the exercise of Crown prerogative to make appointments to the judiciary. This process of appointment does not in any way undermine the security of judicial tenure.

[172] Unlike the Scottish situation, magistrates are not temporary appointments, and these persons do not need to rely on the favour of the Executive for their security of tenure; they are indefinite appointments, which are made possible at the Governor's pleasure.

[173] The Public Prosecutor's response to the above argument, was to point out the difference between a substantive hearing on the merits, and a committal for trial; the difference, of course, being the absence of judicial discretion. It was in effect argued by the Prosecutor that, where there is an absence of discretion, there can be no judicial decision making, and therefore no actual or apparent bias.

[174] *Archibold's Commentary* (Ch 16, Sect. IV; 2003) was cited in support of the Public Prosecutor's response; in particular, 16.61, which states:

> Article 6 [of the Convention] does not necessarily apply to preliminary hearings concerning trial arrangements and matters of procedure.

[175] A closer look at the authority for this proposition, *X v U.K.* 5 E.H.R.R 273 (EHRC), shows us that the principle behind the above statement is not so qualified. The Commission rejected the complaint under art 6(3)(c) of the Convention, which provides the right to defend oneself (either in person or by legal assistance of one's own choosing). While the Commission had previously left open the applicability of art 6(3)(c) to pre-trial proceedings, it found in the case to hand that no question had arisen of the applicant being required to defend himself, since the hearing in question had merely concerned the procedural step of appointing fresh solicitors to defend him, and not the determination of any charge.

[176] It seems to us that the dicta in *X v U.K.* can be applied, by way of analogy, to the present case,

where the argument relates to art 6(1) and the right to receive a "fair and public hearing within a reasonable time by an independent and impartial tribunal."

[177] Of interest to us, throughout both of the judgments cited by the Public Defender, is dicta referring to the "judicial process," "judicial functions" and the right of an accused in criminal proceedings "to be tried" by an independent and impartial tribunal. Lord Bingham of Cornhill, for example, says at 1627-28 in *Miller*, that

> ...[t]here are few, if any, Convention rights of more practical importance to the citizen than the right to a fair trial.

[178] These comments speak, not to procedural or administrative matters, but to substantive matters and findings by the Court; they support the Public Prosecutor's argument.

[179] As this Court is being asked to rule on the situation at hand, our decision must necessarily be confined to the present situation. We find that, because this is a situation where only committal for trial has taken place, there can have been no breach of art 6(1) of the Convention. Whilst committal for trial is not as strictly procedural in nature as an adjournment, the substantive hearing and possible sentencing will be carried out by the Justices of the Supreme Court, not the Magistrates. In this light, the dicta in *Starrs* and *Miller* can be distinguished, in so far as it relates to substantive hearings before tribunals.

[180] In any event, we note that now security of tenure of magistrates and other judicial officers is provided for in the 2003 Ordinance, to the age of 65 years.

[181] Before leaving human rights, we should mention that the Public Defender raised the issue of public hearing. We accept that, subject to the constraints of location, logistics and the Pitcairn ordinances, trials must be heard in public.

VI. DEPOSITIONS HEARINGS

[182] The Public Defender challenged the legality of the deposition hearings; firstly on the basis of arguments already advanced; and secondly on the basis that the law applicable at the time of the alleged offences was the law of Pitcairn, not the laws of England. He argued that the procedures now set out in the relevant Ordinances are in effect introducing oppressive and harsh legislation, which undermines the rights under English law.

[183] We do not accept the Public Defender's argument. The Judicature (Courts) Ordinance 2000 specifically provides for the conduct of preliminary hearings by the Magistrates' Court. The Justice Ordinance – Revised Edition 2001, has enacted a code of committal proceedings, modelled on the "paper committal" proceedings in England under the Criminal Procedure and Investigations Act 1996 (UK). That code has applied to all criminal investigations that began after 1st April 1997.

[184] It is common ground that the investigations into the charges, now before this Court, began in early 2000. As the 1996 UK Act had application in Pitcairn from 1st February 2000, by virtue of the Judicature (Courts) Ordinance 2000, in terms of Pitcairn law the deposition hearings before the Magistrates' Court in 2003 were both lawful and procedurally correct. As the Public Prosecutor pointed out, a process which allows judicial scrutiny of the material relied upon to support the

charges before committal (if at all) to the Supreme Court for trial is hardly oppressive. It is in fact an extra level of protection which enhances an accused person's trial rights.

VII. VENUE OF THE COURT – PITCAIRN COURTS IN NEW ZEALAND

[185] The Public Defender challenged the propriety of Pitcairn Islanders being tried in New Zealand, and questioned whether members of the New Zealand public should be entitled to be present in Court during any trial held here. He advanced certain arguments based on a practice adhered to by the Pitcairn Island Council of approving who may land. We do not propose to deal with the argument on a hypothetical basis. It will be for any trial judge to make such determinations when the time comes. Nor do we intend to determine where any trials should be held. The law reserves this decision to the Governor on the advice of the Chief Justice.

[186] However, to the extent that this argument challenged the ability of the Court to sit in New Zealand, we do have something to say.

[187] The Judicature (Courts) Ordinance 2000 provides for the continuation of the Supreme Court, and the establishment of a Magistrates' Court. The Pitcairn Court of Appeal Order 2000 constitutes a Court of Appeal for the Island, and the Pitcairn (Appeals to Privy Council) Order 2000 provides for appeals to the Privy Council in London.

[188] In October 2002, the Governments of the United Kingdom and New Zealand concluded the "Agreement Between the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Trials Under Pitcairn Law in New Zealand and Related Matters." The Agreement provides for Pitcairn courts to sit, and for sentences to be served, in New Zealand. Legislative effect was given to the Agreement by the Pitcairn Trials Act 2002 (NZ), which came into force on 14th March 2003 (due to the Pitcairn Trials Act Commencement Order 2003 (NZ)), along with the Judicature Amendment Ordinance 2003.

[189] Following on from the Agreement, in December 2002, the Judicature (Courts) Ordinance 1999 was amended to allow the Magistrates' Court and the Supreme Court to sit "in the Islands or at such other country or place as may be permitted by any law." The "any law" term would, in present circumstances, relate to the Agreement. The Interpretation and General Clauses Ordinance 1952 defines "law" as meaning "any law for the time being in force in, having legislative effect in, extending to, or applicable in, the Islands."

[190] Section 5(2A) of the Pitcairn Order 1970 (UK), inserted by the Pitcairn (Amendment) Order 2000, provided that the courts of Pitcairn may sit:

> ...in the United Kingdom, or in such place within any other part of Her Majesty's dominions as the Governor, acting in accordance with the advice of the Chief Justice and with the concurrence of the Governor of such part of Her Majesty's dominions, may appoint.

[191] However, the Pitcairn (Amendment) Order 2002 (UK), which came into force on 20th November 2002, has expressly repealed s 5(2A) of the Pitcairn Order 1970, and replaced it with the following provision:

> (2A) *Subject to the provisions of any law for the time being in force in the Islands*, a court

established under subsection (2) shall sit in such place in the Islands as the Governor, acting in accordance with the advice of the Chief Justice, may appoint.

Provided that it may also sit in the United Kingdom, or in such other place as the Governor, acting in accordance with the advice of the Chief Justice, may appoint. [Emphasis added]

[192] This provision would also come within the "any law" requirement, above, but this time in relation to the law in Pitcairn, which is the 1999 Ordinance. A more liberal interpretation of the proviso in the new s 5(2A), is that the phrase "subject to the provisions of any law for the time being in force in the Islands" does not apply to the "other such place as the Governor...may appoint" proviso – otherwise, both paragraphs would commence with the words "subject to".

[193] In any event, we note the absence of the arguably problematic terms "governor" and "dominions", which the old s 5(2A) used to describe potential locations for Pitcairn courts.

[194] In March 2003, the Governor of Pitcairn made an Order under s 5(2A) of the Pitcairn Order, expressly declaring New Zealand to be appointed as a place where the Magistrates' and Supreme Courts may sit for the purposes of the current trials.

[195] We are satisfied that, pursuant to the Agreement and other relevant laws in general, as well as the ones relating directly to these trials, not only can the preliminary hearings be held in New Zealand, but the trials themselves may be held and determined in New Zealand.

VIII. RIGHT TO JURY TRIAL

[196] The Public Defender challenged the right of the Governor to legislate for a trial process which does not include a right to trial by jury. He submitted that Pitcairn Islanders are entitled to be tried by a jury and the removal of that "right" is illegitimate.

[197] He relied on art 6 of the European Convention on Human Rights which provides that any criminal charge against a person entitles a person "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[198] The Public Defender submitted that a right to trial by jury is a fundamental part of the common law tradition, which Pitcairn Islanders are entitled to enjoy just as those living in the United Kingdom do. The argument was that the trial before the Supreme Court of Pitcairn should be no different from a trial before its mainland equivalent, and that Pitcairn Islanders are entitled to enjoy the same procedure as applies in Britain.

[199] The Public Prosecutor responded that art 6 does not require trial by jury, and that a number of the signatories to the European Convention do not permit criminal cases to be heard by a jury. Accordingly, art 6 does not provide a legal basis for the Public Defender's submission.

[200] The Prosecutor submitted that the Court must apply the law of Pitcairn as set out in the Judicature (Courts) Ordinance 2001, and the Justice Ordinance 2001, for which no provision for jury trials is made.

[201] All parties will be aware of the practical difficulties around constituting a jury of 12 people

independent of the accused on Pitcairn, even if the law so provided.

[202] The right to trial by jury is recognised as one of the rights and liberties enshrined in ch 29 of Magna Carta 1297 (25 Edw. ICI), in its modernised wording, cited in *Halsbury Statutes of England and Wales* (4th ed, Vol 10, 1995 reissue), p16:

> No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

[203] This principle of trial by jury was confirmed by the Act of Settlement (1 Will and Mary c.2) and declared to be "the birthright of the people of England".

[204] The issue was examined by the High Court in *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and Another* [2001] QB 1067 per Laws LJ and Gibbs J, when dealing with the affairs of the people of the Chagos Archipelago in the Indian Ocean, known as the British Indian Ocean Territory. The headnote states a main finding of that decision, which is

> ...[t]he principle that fundamental or constitutional rights might not be abrogated by a subordinant instrument made pursuant to legislation cast in general terms, but only pursuant to a specific provision in an Act Parliament, did not apply to colonial laws which, by virtue of sections 2 and 3 of the Colonial Laws Validity Act 1865, were only void if and to the extent that they were repugnant to an Act of the United Kingdom Parliament applicable to that colony, and not on the ground of repugnancy to the law of England generally...

[205] At page 1104, Laws LJ deals with the legality of an ordinance, said to be made in pursuance of the obligation to legislate for the territory's peace, order and good government, which allowed for the people of Chagos to be removed from the territory. The Court found that they were entitled to be governed but not removed. His Lordship went on to say:

> ...the people may be taxed; they should be housed; laws will criminalise some of the things they do; may be they will be tried with no juries, and subject to severe, even brutal penalties; the laws made for their marriages, their property, and much besides may be far different from what obtains in England. All this is vouchsafed by the authorities.

[206] We are satisfied that in not providing for trial by a jury there is no breach of the European Convention for Human Rights. This Court is bound by the ordinances properly legislated, lawfully providing for trial of the defendants without jury.

IX. ENGLISH LAW OR PITCAIRN LAW: SEXUAL OFFENCES

[207] The Public Defender has raised the argument that no statutes of Great Britain have been extended to apply to Pitcairn Island. The Public Defender contended that the application of English law, as purported to be effected by the amendment to the Judicature (Courts) Ordinance in 2002, was not pursuant to any legal powers delegated to the Governor. It was argued on behalf of the accused that:

> ...expediency and the perceived needs to punish alleged crimes cannot allow other than the strictest adherence to the appropriate principles of law and justice developed over many long years in the Courts and the legislatures of Great Britain.

[208] The Public Prosecutor, on the other hand, asserted that there are several criminal law statutes which apply to Pitcairn Island. The main constitutional document for Pitcairn is the Pitcairn Order 1970 (UK), made pursuant to the British Settlements Acts 1887 & 1945. The Order, along with the Royal Instructions, allows the Governor of Pitcairn to make "laws for the peace, order and good government of the Islands." (s 5(1).)

[209] The pathway illustrating the application of UK Criminal Statutes to Pitcairn is as follows:

> Sections 7 & 8 of the Judicature Ordinance 1961, which provided that the substance of the law, for the time being in force in, and for England, shall be in force in Pitcairn.
>
> Section 14(1) of the Judicature Ordinance 1970, which provided that the common law, rules of equity and the statutes of general application in force in, and for England, at the commencement of the Ordinance, shall be in force in Pitcairn. The 1970 Ordinance was revised, without amendment to s 14(1), in 1974.
>
> Section 14(1) of the Judicature Ordinance 1988 provided that the common law, rules of equity and the statutes of general application in force in, and for England, on 1st January 1983, shall be in force in Pitcairn.
>
> Section 16(1)&(2) of the Judicature (Courts) Ordinance 2000 provides that the common law, rules of equity and the statutes of general application in force in, and for England, "for the time being", shall be in force in Pitcairn. This Ordinance was revised, without amendment to s 16(1)&(2), in 2001.

[210] The Public Prosecutor asserted that the local circumstances and jurisdiction so permit, and there are no ordinances providing otherwise. He said, this being the case, the accused must be charged pursuant to English statutes.

[211] The Sexual Offences Act 1956 (UK) was in force during all of the periods referred to above - even prior to 1970, so except for where Pitcairn law expressly provides for offences, or provides otherwise, or the local circumstances provide otherwise, the Act applies to the present charges.

X. SUMMARY OF FINDINGS

[212] Mindful that we are a Court, and have no credentials as a commission constituted to revise history, we have nevertheless carefully considered the detailed and painstakingly prepared submissions of the Public Defender on historical matters relating to Pitcairn Island. Put at their most simple, these submissions were intended to demonstrate that, the traditional view that Pitcairn is a British settlement (amenable to transition to a British territory by formal legislative steps based on the British Settlements Act 1887) is erroneous. If that be so, he argued, the application of certain ordinances and British imperial laws to the residents of Pitcairn would founder, and so would plans to prosecute the accused.

[213] We have not been persuaded that there are any grounds to doubt the historical tradition surrounding the establishment and development of a British settlement on Pitcairn, nor the applicability of the laws enacted for Pitcairn. We conclude that the current municipal and international reality of British Governance is not shaken by the argument that the legitimacy of its establishment is flawed.

[214] From first settlement by British subjects, albeit in rebellion; through the supplementing of the tiny British community by the arrival of Buffett, Evans and Nobbs; the formal assistance rendered to protect the community and particularly the Quintal family by removal of the capricious interloper Hill by the Royal Navy in 1838; the consequential assistance rendered by HMS *Fly* to put internal laws in place to prevent a repeat; the frequency of visits by warships from Valparaiso Station over ensuing years; the response of the Crown to the request of leading citizens to remove the, by then, overlarge population to Norfolk Island in 1856 and, after the return of some families a few years later, the resumption of ship visits; the reality of a tradition of loyalty to the Crown and to Britain openly expressed by the settlers and endorsed by their contemporaneous writings; the course of conduct of all concerned being consistent with a settlement of British subjects, favoured by the protection of the Crown.

[215] When the Pacific Order in Council 1893, enacted under the British Settlements Act 1887, was extended to apply to Pitcairn in 1897 and 1903, the formality of the envelopment of Pitcairn into the British legal community was perfected. Acknowledged flaws in subsequent legislation were resolved, so that by virtue of the British Settlements Act 1945 (and the 1952 Pitcairn Order in Council), the Governor of Fiji was constituted also the Governor of the possession of Pitcairn. In 1970, upon Fiji gaining independence, a fresh Pitcairn Order in Council constituted a separate Governor, courts and laws. Today, that situation continues, yet in accordance with international recognition, Pitcairn is classified by British municipal law as a territory.

[216] We conclude therefore, upon a careful examination of the history and the application of laws, as we were invited to do by the Public Defender, that British jurisdiction and the laws enacted for the territory of Pitcairn apply to the accused.

[217] We are further entitled to consider this same question on legal bases other than matters historical. The weight of precedent enjoins us not to conduct a review of history as a suitable path to decision, but to accept obediently the acts of the Crown (known as acts of State) of both an Executive and Legislative kind which claim Pitcairn to be a British territory, and its population as British subjects or persons subject to British laws. We have discussed these matters in detail in the body of this judgment. Based on the reality of the longstanding legislation, Orders in Council and Executive acts done for over a century, we reach the same conclusion.

[218] Further, we consider that the international reality of wide recognition of British rule in Pitcairn by independent states and organs of the European Union and the United Nations Organisations, points to the same conclusion. Likewise, the durability, efficacy and legitimacy of British rule is demonstrated by the enduring nature of the adherence of both the Crown and people to each other, which has been reflected over the years in such things as the issue of stamps and coins, and the assignment of an Armorial Ensign for Pitcairn, as well as Royal visits, and financial and governmental assistance.

[219] Accordingly, we decline to make the declaration sought by the Public Defender that Orders in

Council for Pitcairn are invalid, and ordinances thereunder be likewise declared invalid.

[220] For reasons also traversed in this judgment, we: uphold the legal impartiality of the committing Magistrate, and the validity of the committal proceedings; confirm that Pitcairn courts may sit in New Zealand, in accordance with the correct application of the provisions of the law of both jurisdictions; and hold that, under Pitcairn law, trial without a jury is not a breach of the rights of residents, and that the Sexual Offences Act 1956 (UK) applies as part of the law of Pitcairn Island.
